not here a condition the introductory words before the covenant are superfluous. Third: it is unlikely that the Crown in 1860 should have intended, when the future of the colony was not predictable, to provide for future public user requirements in a manner (covenant only) that might be valueless should the land come to the hands of a purchaser for value without notice. All these are points worth making in argument, but they do not persuade their Lordships.

The rights of the State depending only upon an equitable interest under the covenant, the final question is whether Hoalim when he bought in 1951 had constructive notice of that interest, viz: the contents of the 1860 grant. Their Lordships stress that the allegation of constructive notice is not founded upon a suggestion that Hoalim must have known that the original title stemmed from a Crown grant and should have searched at the Land Office for its contents. The allegation rests entirely upon the fact that in the 1878 conveyance, the root of title, the description of the island conveyed included the reference already quoted to the plan endorsed upon the 1860 grant. It was contended that any purchaser must reasonably be expected to require production of the plan, to examine it, and also to read the instrument upon which it was endorsed. Their Lordships are quite unable to accept this. They have already referred to the superfluity, nay irrelevance, for the purpose of identification of this island of the reference to the plan in the 1860 grant. The same comments are applicable to the schedule to the 1878 conveyance. The island conveyed was completely and perfectly identified in a manner upon which no survey plan could improve: or if perchance it displayed some conflict with the already complete and perfect identification it would have to be rejected. Their Lordships see no ground for holding that in those circumstances Hoalim was in any sense of the word required to look at the 1860 grant. In concluding therefore that there was here no constructive notice, their Lordships wish only to add that the phrase, sometimes found, "notice of a deed is notice of its contents" must not be taken as of universal literal application.

Accordingly both appeal and cross-appeal will be allowed, in each case with costs, with any appropriate set-off.

In the result the order of the Court of Appeal will be varied as follows:

(1) By substituting for its opinion on question (i) in the Case Stated the following Answer: "The said provision is a covenant creating an equitable interest in land and not also a condition".

(2) By substituting for its opinion on question (v) in the Case Stated the following Answer: "The non-registration of the original grant does not enable the appellant Hoalim to assert that for that reason he is not bound. The appellant Hoalim did not have constructive notice of the provision".

Appeal and cross-appeal allowed.

Solicitors: *Coward Chance; C. Butcher & Simon Burns.*

MENAKA v. LUM KUM CHUM

[P.C. (Lord Simon of Glaisdale, Lord Fraser of Tullybelton and Lord Russell of Killowen) December 21, 1976]

[Privy Council Appeal No. 16 of 1974]

Contract — Loan made by moneylender in name other than registered name — Agreement forbidden by law — Contract void — Parties unaware of illegality until after execution of contract — Whether moneylender entitled to recover money lent and interest thereon — Contracts (Malay States) Ordinance, 1950, ss. 24 and 66.

Moneylenders — Money lent by moneylender in name other than registered name — Loan illegal and void — Moneylenders Ordinance, 1951, ss. 8(b) and (c) and 16.

This was an appeal from the decision of the Federal Court ([1973] 2 M.L.J. 154). The appellant was a registered moneylender carrying on business under the name of AR. PR. M Firm. Through her attorney she lent some money to the respondent on the security of a charge of certain lands belonging to the respondent. The loan was made by the attorney on behalf of the appellant personally. The appellant applied for an order for the sale of the lands to satisfy the principal sum and interest. The respondent objected to the application on the ground *inter alia* that, as the loan was not made in the registered name of the moneylender, the moneylender had contravened the provisions of section 8(b) and (c) of the Moneylenders Ordinance. The Federal Court by a majority held that the agreement in this case was forbidden by section 8(b) of the Moneylenders Ordinance and was therefore void. The majority held that the learned trial judge was right in the circumstances of the case in finding that neither the appellant nor her attorney was aware of the illegality of the transaction at the time of the execution of the documents and therefore section 66 of the Contracts (Malay States) Ordinance was applicable and the learned trial judge was right in ordering the return of the $19,400, the balance of the principal sum, to the appellant. The appellant appealed against the dismissal of her claim and before the Privy Council the respondent was given leave to cross-appeal against the decision of the Federal Court that he was liable for interest at 6% from the date of the raising the action.

Held: (1) the appellant in this case had contravened paragraph (c) of section 8 of the Moneylender Ordinance and therefore the contract and the security were unenforceable;

(2) in the circumstances of this case as neither party was aware of the illegality at the time of making the loan transaction and the documents were prepared and executed on both sides in complete good faith, the appellant was entitled to restitution of the balance of the principal sum of $19,400;

(3) the award of interest was in the discretion of the court and in this case as it had not been shown that the Federal Court committed any error of law in the exercise of their discretion, their decision will be upheld.

Cases referred to:-

(1) *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Hosken* (1912) 14 C.L.R. 286.
(2) *Chai Sau Yin* v. *Kok Seng Fatt* [1966] 2 M.L.J. 54.
(3) *Cope* v. *Rowlands* 1836 2 M. & W. 149, 157.
(4) *Cornelius* v. *Phillips* [1918] A.C. 199.
(5) *Govindram Seksaria* v. *Radbone* (1947) L.R. 74 Ind. App. 295, 303.
(6) *Babu Raja Mohan Manucha* v. *Babu Manzoor Ahmad Khan* (1942) L.R. 70 Ind. App. 1, 10.
(7) *Cantiere San Rocco* v. *Clyde Shipbuilding and Engineering Co.* (1923) S.C. H.L. 105; [1924] A.C. 226.
(8) *Suganchand* v. *Balchand* A.I.R. 1957 Rajasthan 89.
(9) *Harnath Kaur* v. *Indar Bahadur Singh* (1922) L.R. 50 Ind. App. 69.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Robert Gatehouse Q.C. (*Eugene Cotran* and *V.K. Palasuntharam* with him) for the appellant.

Nigel Murray (*M. Segaram* with him) for the respondent.

Lord Fraser of Tullybelton (delivering the judgment of the Board): The appellant is a moneylender in Kuala Lumpur. She is licensed under the Moneylenders Ordinance, 1951 (No. 42 of 1951), to carry on the business of moneylending under the name of "AR.PR.M.Firm". There were two partners in the firm, the appellant who was the managing partner, and a man named Chockalingam who lived in Madras and who appears not to have taken an active part in the business. On January 11, 1965 the firm made a loan of $20,000 to the respondent's deceased husband Ng Siew San; he died during the course of the litigation and the respondent is his executrix. As security for the loan Ng gave a charge over six pieces of land in favour of the appellant, and the proceedings began with an Originating Summons on February 1971 in which the appellant applied for an order for sale of the land by public auction to satisfy the principal sum and the arrears of interest then due to her. Ng opposed the application and counterclaimed for an order that the contract of loan and the charge were illegal and void and were therefore unenforceable. The matter first came before Mohamed Azmi J. Both he and, on appeal, the Federal Court (by majority) decided in favour of the counterclaim, and dismissed the appellant's claim. The appellant now appeals against the decision of the Federal Court. If the decision was right, and the contract and the security are void, the respondent admits that she as executrix is bound under the Contracts (Malay States) Ordinance, 1950, to restore to the appellant the principal sum borrowed, but there is a dispute as to whether the respondent is also bound to pay any interest on the principal sum and, if so, at what rate and from what date. The Federal Court held that the respondent was liable for interest at 6% from the date of raising the action. The respondent wished to cross-appeal against that part of the decision but not having obtained leave for a cross-appeal from the Federal Court lodged a petition for special leave to cross-appeal. Their Lordships will advise the Yang Dipertuan Agung that such special leave be granted.

The first question is whether the appellant contravened the Moneylenders Ordinance, 1951, by entering into the contract and taking the security in her own name instead of in the name of the firm. Before Mohd. Azmi J. counsel for the appellant conceded that there had been contraventions of that Ordinance but the concession was later withdrawn (quite properly), and in the Federal Court and before their Lordships' Board the submission for the appellant on this point was that there had been no contravention of the Ordinance. Consideration of this question must start from the fact that the lender was the firm AR.PR.M. and not the appellant as an individual. That was accepted by both parties. The loan was made by a cheque signed on behalf of the firm and presumably drawn on the firm's account in the bank, the transaction was recorded in the books of the firm, and receipts for the only two instalments of interest that were paid were granted on behalf of the firm. The difficulty from the appellant's point of view arises because two essential documents in relation to the loan contained statements that the lender was the appellant as an individual. One of these documents was the Note or Memorandum of Loan which is required by section 16 of the Moneylenders Ordinance to be signed by or on behalf of both parties to a contract of this sort, and without which no contract for the repayment by a borrower of money lent to him is enforceable. The other document was the Memorandum of Charge, under the Land Code, by which the borrower Ng charged the land as security for the loan and the appellant accepted the charge. The contention of the respondent, which succeeded in both the lower courts, is that the appellant, by taking these two documents in her own name as an individual, contravened section 8 of the Moneylenders Ordinance.

In order to understand that section it is necessary also to refer to certain earlier sections of the Ordinance. The scheme of the Ordinance is that every moneylender in the Federation must take out an annual licence in each State in which he carries on business as a moneylender — section 5(1). A licence must be taken out in respect of each name under which moneylending business is conducted — section 5(2). (The Ordinance evidently contemplates that a moneylender may carry on moneylending business under more than one name). A licence taken out by a person as a partner in a firm is deemed to be a licence to the firm — section 5(3). Sections 6 and 8 are important and must be quoted at greater length:

> "6. (1) Every licence granted to a moneylender shall show his true name and the name under which, and the address at which, he is authorised by the licence to carry on business as such, ... no licence shall authorise a moneylender to carry on business under any name except —
>
> (a) his true name ...; or
>
> (b) the name of a firm in which he is a partner ...; or
>
> (c) a business name, whether of an individual or of a firm in which he is a partner, ...
>
> (2) Any licence taken out in a name other than the moneylender's true name shall be void.
>
> 8. If any person —
>
> (a) takes out a licence in any name other than his true name; or
>
> (b) carries on business as a moneylender without holding a licence or, being licensed as a moneylender, carries on business as such in any name other than his authorised name or at any other place than his authorised address or addresses; or
>
> (c) in the course of business as a moneylender enters as principal or agent into any agreement with respect to any advance or repayment of money or takes any security for money otherwise than in his authorised name,
>
> he shall be guilty of an offence under this Ordinance and shall be liable to a fine ... and for a second or subsequent offence ... to imprisonment. ..."

The respondent contends that the appellant contravened section 8(b) because she "carried on business" as a moneylender in a name other than her authorised name, and also section 8(c) because she entered as principal into the agreement with Ng with reference to an advance and a repayment of money otherwise than in her authorised name, and because she took the security otherwise than in her authorised name. The facts are not in dispute. The appellant applied for a licence in June 1964 and in her application she stated that the name under which she desired to carry on business as a moneylender was "AR.PR.M.Firm". The licence has not been produced in these proceedings but it has been assumed by all concerned that a licence was granted to her and was in force on the date on which the loan was made, authorising her to carry on

moneylending business under that name, and their Lordships see no reason to doubt the soundness of that assumption. The appellant's authorised name therefore was AR.PR.M.Firm. It follows that the appellant, by becoming a party in her own name to the Memorandum of Loan which showed herself as the lender, and by taking the charge to herself (with no reference to the firm in either document), entered into an agreement and took a security otherwise than in her authorised name. Both these documents were signed on behalf of the appellant by her Attorney. He was a clerk employed by the firm, but in their Lordships' view it is irrelevant that he was employed by the firm and that he was licensed to carry on business on behalf of the firm. Both documents are signed "Menaka Wife of M. Deivarayan by her Attorney" and the appellant thus became a party to the documents just as if she had signed them with her own hand.

Mohamed Azmi J. and, in the Federal Court, the Lord President and Suffian F.J., held that the appellant had contravened section 8(c) of the Ordinance in those two respects. Ong Hock Sim F.J. dissented and thought there was nothing in the Ordinance which required that the authorised firm name must be used in lieu of the moneylender's true name. With respect their Lordships are unable to agree with that view. Section 8 penalises, and by clear implication prohibits, the activities there specified by a moneylender otherwise than in his "authorised name". "Authorised name" is defined in section 2 of the Ordinance as 'the name under which . . . a moneylender is authorised by a licence granted under this Ordinance to carry on business as a moneylender", and section 6(1) which has been quoted above shows that the "authorised name" need not be the same as the moneylender's "true name" though it may be. The only name in which a moneylender can, in the course of business as such, lawfully enter into an agreement or take a security is his authorised name and, if it is different from his true name, he is guilty of an offence under section 8 if he does either of those things in his true name.

It was argued that, if that was the effect of section 8 of the Moneylenders Ordinance, it would conflict with the provisions of the Land Code of Malaysia (Cap. 138) because the Code does not allow land to be charged to a partnership firm. That is the effect of section 47 and section 10 of the Code. Section 47 provides that as a general rule a proprietor of land shall have the right to transfer or charge or lease his land "to any such individual person, company or body corporate as is in section 10 mentioned." Section 10 mentions an individual person and various kinds of companies and bodies corporate but does not mention a firm. The Lord President suggested that these provisions of the Land Code could have been complied with by stating in the Memorandum of Charge that the appellant as chargee was the trustee or managing partner of the firm, and that by inserting the name of the firm in that way section 16 of the Moneylenders Ordinance would also be complied with. It might seem that an obvious solution of the problem would be to describe a chargee, such as the appellant, as trustee for the firm, as is the common practice in Scotland where a partnership firm is incapable of taking a feudal title in its own name. But that solution is, in their Lordships' opinion, not available in Malaysia because of the provision of sections 160 and 161 of the Land Code. Section 160 provides that when any land is *inter alia* transferred or charged to a trustee, the transferor or chargor may insert in the memorandum of transfer of charge the words "as trustee". But those words by themselves, without a reference to the name of the firm, would not be enough to comply with the Moneylenders Ordinance, and section 161 seems to have the effect of prohibiting the registration of a deed stating the names of the persons for whom the trustee holds. Section 161 provides that the registering authority shall not make any memorial of the particulars of any trust, nor shall any instrument be registered under the Enactment " which declares or contains trusts relating to land," and their Lordships therefore consider that the Memorandum of Charge could not lawfully have described the appellant as trustee "for the firm of AR.PR.M.". But there is no express provision in the Land Code against describing a chargee as managing partner of a firm, and Mr. Segaram, junior counsel for the respondent, drew the attention of their Lordships to the discretion conferred by section 230(a) of the Code upon the registering authority to "permit such alterations and additions to any of the Forms in Schedule . . . XXIV [which relates to a Memorandum of Charge] as are necessary or desired and are not inconsistent with anything in any written law contained." The discretion would appear to be wide enough to enable the registering authority to permit the chargee to be described as "Menaka as managing partner of the AR.PR.M.Firm". That would be consistent with the decision of the High Court of Australia in *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Hosken*[1] under the (Victorian) Transfer of Land Act, 1890. It was held that the Registrar of Titles was not justified in refusing to register a mortgage, otherwise in the ordinary form, of land on the ground that there had been added to it a guarantee by persons not proprietors of the land.

In *Chai Sau Yin* v. *Kok Seng Fatt*[2] where the moneylender's true name was Kok Seng Fatt and he was one of a number of partners carrying on business under the authorised name of Yoong Shing Finance Company, it was held that he complied with the Ordinance when he was described in the Memorandum of Loan and the charge as "Kok Seng Fatt of Yoong Shing Finance Company". It is not necessary to consider here whether that case was rightly decided, but, if it was, it would provide another possible solution to the difficulty caused by section 161 of the Land Code. Accordingly their Lordships agree with the majority of the Federal Court that there is no necessary conflict between the natural sense of section 8 of the Moneylenders Ordinance and the Land Code and they reject the argument based upon such an alleged conflict.

For these reasons their Lordships are of opinion that the appellant contravened paragraph (c) of section 8. It may be that she also contravened paragraph (b) of the section. Mohamed Azmi J. thought that she had, but the Lord President (with whom Suffian F.J. agreed) was "inclined to agree" with her counsel that she had not, although his Lordship did not express a concluded opinion on the point. There may be room for doubt whether the appellant's actions in

making the contract and taking the security in her own name were by themselves enough to amount to carrying on business, but their Lordships do not find it necessary to decide the question as they are of opinion that the contravention of section 8(c) is clearly established.

What then are the results of such a contravention and in particular does it avoid the contract between the appellant and the respondent's late husband, and the charge that was granted to the former by the latter? Section 8 of the Moneylenders Ordinance provides in terms for criminal sanction by way of a fine or imprisonment on any person who is guilty of an offence under the section, but it is silent on the question whether the offending contract and charge are to be avoided. The general rule was stated in *Cope* v. *Rowlands*[3] by Parke B. thus:

"It is perfectly settled, that where the contract which the plaintiff seeks to enforce... is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies prohibition."

That general rule was applied by the House of Lords in *Cornelius* v. *Phillips*[4] which was a case under the (United Kingdom) Moneylenders Act 1900. Viscount Haldane said at page 211 that the application of the general rule might have been modified if there had been a special context in the statute demonstrating an intention to exclude the general rule, and their Lordships do not doubt that such a context could be provided either by express words or by necessary implication. Much of the argument for the appellant before this Board was devoted to suggesting that such a context was to be found in the Ordinance of 1951, particularly in section 15. Section 15 provides:

"No contract for the repayment of money lent after the coming into force of this Ordinance *by an unlicensed moneylender* shall be enforceable:..."

That clearly applies to a contract by a moneylender who contravenes section 8(b) by carrying on business without holding a licence at all, and it may also apply to a contract by a moneylender who contravenes section 8(a) by taking out a licence in a name other than his true name, because such a licence is void under section 6(2). But those are only two of the types of transaction prohibited by section 8, and it was argued on behalf of the appellant that there was a necessary implication that the other types of transaction prohibited by section 8 but not mentioned in section 15 (including in particular the two types of transaction under section 8(c) to which the present appellant was a party) were not to be unenforceable. *Inclusio unius est exclusio alterius.* Their Lordships recognise the force of the argument but they have reached the opinion that it is not sufficient to overcome the general rule. If the argument were to succeed, it could only be on the basis that the draftsman had created exceptions to the general rule in favour of all except two of the types of transaction mentioned in section 8 by the curiously roundabout method of providing that those two transactions would be subject to the rule. That seems most unlikely. Their Lordships consider that it is more reasonable to regard section 15 as having been inserted *ab majorem cautelam,* perhaps in order to emphasise the gravity of the offence committed by a person who carries on business as an unlicensed moneylender. No doubt section 15 is, on that view, unnecessary but unnecessary words do sometimes find their way into statutes and Ordinances.

Their Lordships are therefore of opinion that the contract and the security, having been made in contravention of section 8, are unenforceable. As the contract is not enforceable by law, it is void under section 2(g) of the Contracts (Malay States) Ordinance, 1950. Neither party was aware of the illegality at the time of making the loan transaction and the documents were prepared and executed on both sides in complete good faith. The contract was "discovered" to be void only after these proceedings had been started. Section 66 of the Contracts Ordinance therefore applies and both parties before this Board accepted that it does. Section 66 provides as follows:

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

Mohamed Azmi J. gave effect to section 66 by finding that the advantage which the borrower had received under the contract was the sum of $20,000 and that he should restore that sum to the appellant. But as he had made two payments of interest amounting together to $600 the learned judge found that the $600 was an advantage received by the lender and that it should be deducted from the $20,000 leaving a balance of $19,400 to be paid by the respondent who now represents the borrower. Leaving aside for the moment the question of whether any interest should also be payable, their Lordships agree with both Courts below that the principal sum of $19,400 should be paid by the respondent to the appellant. In that way effect will be given to section 66 under which each party is bound to restore any advantage which he has received to the person from whom he received it — see *Govindram Seksaria* v. *Radbone*[5] where Lord Morton of Henryton said:

"The result of section 65 of the Indian Contract Act was that, as from [the date on which the contract became void] each of the parties became bound to restore to the other any advantage which the restoring party had received under the contract of sale."

Section 65 of the Indian Contract Act, 1872, is in terms identical with those of section 66 of the Contracts (Malay States) Ordinance, 1950. The principle underlying both sections is the same, and it is that

"a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation."

See *Babu Raja Mohan Manucha* v. *Babu Manzoor Ahmad Khan.*[6] This principle of restitution has been applied where the contract became void within the meaning of section 65 of the Indian Contract Act owing to the outbreak of war in 1939 — see *Govindram Seksaria* v. *Radbone, supra* — and it appears to be based on the principle exemplified in the Roman Law *condictio causa data causa non secuta* — see *Cantiere San Rocco* v. *Clyde Shipbuilding & Engineering Co.*[7] (contract becoming impossible to perform owing to the outbreak of war in 1914).

Their Lordships have carefully considered whether they ought to depart from the Order of the Federal Court on the matter of interest. Mohamed Azmi J. made no order for payment of any interest on the sum of $19,400. The Federal Court amended the Order of Mohamed Azmi J. by including an Order for payment of interest at 6% on the $19,400 from the date of raising these proceedings, February 17, 1971, but otherwise affirmed the order. Their Lordships have felt some doubt whether there was jurisdiction to award interest under section 66 from a date earlier than the date of raising proceedings. The contract of loan having become void, the contractual stipulation for interest can no longer be enforceable, and no statutory authority either in the Contracts Ordinance or elsewhere was cited for awarding interest from a date prior to the raising of the proceedings. In one case mentioned in argument, *Suganchand* v. *Balchand*,[8] the Court of Appeal in Rajasthan in a case under section 65 of the Indian Contract Act appears to have considered that it had no jurisdiction to do so. But in *Harnath Kuar* v. *Indar Bahadur Singh*,[9] this Board seems to have considered that it had jurisdiction to give interest from the date of the void contract, although "in the circumstances of this case" they gave it only from the date of institution of the suit. And in *Babu Raja, supra* this Board made an award of interest from the date of the loan, though at a lower rate (6%) than had been stipulated in the contract (9%) but it does not appear that the question of jurisdiction was considered in that case, and the debtor was not represented before the Board. No reasons are given for fixing the rate at 6%. In these circumstances their Lordships will assume, without deciding, that they and the lower courts have jurisdiction to award interest from a date prior to the institution of the proceedings and they proceed to consider whether they ought to do so in the present case.

Counsel for the respondent argued that cases under the Moneylenders Ordinance, or under the corresponding United Kingdom legislation, were in a special position and that in such cases the debtor should not be found liable for interest. But he cited no authority for that proposition and their Lordships are unable to see any justification for it.

The contract of loan provided for interest to be payable at the rate of 12% per annum from the date of the loan and counsel for the appellant sought an order for payment of the interest at that rate (or at some lower rate) from the date of the loan under deduction of course of the $600 of interest already paid. The argument was that the "advantage" which has been received by the borrower did not consist only of $20,000 but was really *the use of* $20,000 (or perhaps more accurately the right to use $20,000) and that therefore in order to comply with section 66 the borrower was bound to restore the $20,000 and to "make compensation for" the use of the money since he received it. This argument is, in the opinion of their Lordships, not well-founded. In the first place if interest at the full contractual rate of 12% were awarded from the date of the loan, the practical result would be the same as if the contract were to be enforced. That would in effect prevent the application of section 8 of the Moneylenders Ordinance and their Lordships would not think it right to bring about such a result. In the second place an award of interest, whatever the rate, would involve looking to the profit that the borrower might make by using the advantage instead of looking only at the value, at the date when the contract became void, of the advantage received. The only advantage received by the borrower here was, in the opinion of their Lordships, the sum of $20,000, and the value of a sum of money, at whatever date it was ascertained, can only be the sum itself.

Their Lordships therefore do not consider that it would be right to award interest from a date before the institution of these proceedings. But after that date different considerations apply and the award of interest is a matter for the discretion of the court. It is true that apparently *Harnath Kuar, supra* was cited before Mohamed Azmi J., but the learned judge gave no reason for not awarding any interest and their Lordships therefore do not consider that he can be taken to have exercised his discretion on the point. The Federal Court made an award of interest at 6% from the date of raising the action (February 17, 1971) after reference to *Harnath Kuar, supra* and they clearly did exercise their discretion. Their Lordships see no reason to think that the Federal Court committed any error of law in their exercise and they will therefore not interfere with the decision of the Federal Court on this point. The result is that the respondent is bound to pay to the appellant the sum of $19,400 with interest at 6% from February 17, 1971.

There remains for consideration the form of Order made by Mohamed Azmi J. and approved (as amended by the inclusion of interest) by the Federal Court. The operative part of the Order begins by dismissing the appellant's claim for foreclosure (in fact sale) of the respondent's six parcels of land. That part of the Order can stand without amendment. But everything after that is conditional "upon payment of the sum of $19,400 by the respondent [Ng] to the [appellant] within two months from the date hereof". The Order was dated August 12, 1972 so that payment within two months is now impossible and had become so long before the Federal Court gave their decision. Some amendment as to date is therefore necessary in any event. But their Lordships consider that amendment is also required because the avoidance of the contract and of the security is brought about by the provisions of the Moneylenders Ordinance and is not dependent or conditional upon payment of any sum of money by the respondent. Accordingly the declaration of avoidance in paragraph (i) of the Order should be in the opinion of their Lordships be unconditional. So should the orders in paragraph (ii)(a)(b)(c) and (d) which are consequential on the declaration in paragraph (i). That will dispose of the issues arising under section 8 of the Moneylenders Ordinance and only thereafter does section 66 of the Contracts Ordinance come into play. The Order to give effect to that should be for payment by the respondent to the appellant of $19,400 with interest thereon at 6% per annum from February 17, 1971, but as the respondent is the executrix of the original debtor her liability should be limited to her liability as executrix. Their Lordships consider that the actual Order could best be

made by the High Court which is more familiar with the appropriate forms of procedure in Malaysia than they are themselves and they will therefore advise the Yang Dipertuan Agung that the Order made by the lower court on August 12, 1972 and the amendment by the Federal Court made on October 6, 1973 be set aside (except as to costs in both courts) and that the case be remitted to the High Court to make such Order as to that court seems appropriate to give effect to the opinion expressed by this Board. There should be liberty to both parties if so advised to apply to the High Court with regard to the form of Order. The appellant should bear the costs of the proceedings before this Board so far as they relate to the appeal and the respondent should bear the costs so far as they relate to the cross-appeal.

Their Lordships will advise the Yang Dipertuan Agung accordingly.

Order accordingly.

Solicitors: *Wilson Freeman; Lovell White & King.*

MALAYSIAN REPORTS

RE ESTATE OF CHOONG LYE HIN, DECD.; CHOONG GIM GUAN v. CHOONG GIM SEONG

[F.C. (Suffian L.P., Lee Hun Hoe, C.J. (Borneo) and Wan Suleiman F.J.) October 16, 1976]

[Penang — Federal Court Civil Appeal No. 3 of 1975]

Administration of estates — Inter vivos gifts — Payment of estate duty due on inter vivos gifts by trustees — Claim by beneficiary for share in estate — Set-off and counterclaim by trustees — Payment by mistake — Whether recoverable — Limitation — Estate Duty Enactment, 1941, s. 26(1), 33(1) — Trustees Ordinance, s. 60.

The appellant claimed (a) the balance of his share in the estate of his deceased father and (b) the balance of the sum kept in a trust account by his father in an account under the name of "Gim Kee". The respondents the trustees claimed a right to set-off and counterclaim based on estate duty paid out of the estate in respect of *inter vivos* gifts to the appellant and by the third defendant in respect of the share of the appellant in moneys in the Gim Kee account. It was argued on behalf of the appellant that the estate duty was paid without his knowledge, consent or request and that it was paid under a mistake of law and therefore not recoverable. It was also contended that the defendant's right to recover the estate duty was barred by limitation. The learned trial judge gave judgment in favour of the respondent on the set-off and counterclaim. The appellant appealed.

Held: (1) in this case the finding of the learned trial judge that the appellant knew and acquiesced in the payment of the estate duty must be accepted and therefore on the evidence in this case, even though the payment of estate duty was a mistake of law, the circumstances of the case render it inequitable that the appellant should be allowed to retain the benefit of the payment;

(2) the claim of the respondents in this case was not statute-barred;

(3) in view of the large number of proceedings relating to the estate and in order to make it clear that the respondent was not liable to make good to the appellant any benefit already received or enjoyed by the appellant, the respondents was entitled to an order granting relief under section 60 of the Trustees Ordinance.

Cases referred to:-

(1) *Hill* v. *Kirshenstein* [1920] 3 K.B. 556.
(2) *In re Hatch* [1919] 1 Ch. 351.
(3) *Re Diplock's Estate, Ministry of Health* v. *Simpson & Ors.* [1951] A.C. 251.
(4) *In re Diplock, Diplock* v. *Wintle* [1948] Ch. 465.
(5) *Rogers* v. *Ingham* (1876) 3 Ch.D. 351.
(6) *Kiriri Cotton Co. Ltd.* v. *Dewani* [1960] 1 All E.R. 177, P.C.
(7) *Nasri* v. *Mesh* [1971] 1 M.L.J. 32, F.C.
(8) *Strong* v. *Bird* (1874) L.R. 18 Eq. 315.
(9) *In re Forster* [1897] 1 Ch. 484.
(10) *In re Beddington* [1900] 1 Ch. 771.
(11) *In re Crocker* [1916] 1 Ch. 25, 56.
(12) *In re Hudson* [1911] 1 Ch. 206.
(13) *Sinclair* v. *Brougham* [1914] A.C. 398 at p. 456.
(14) *Re Cleadon's Trust Ltd.* [1938] Ch. 286 at p. 321.
(15) *Warren* v. *Warren* 72 L.J. 628.
(16) *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32 at p. 64.
(17) *Re Woodridge* [1920] W.N. 78.
(18) *Dibbs* v. *Goren* 50 E.R. 904.
(19) *In re Ainsworth* [1915] 2 Ch. 96 at p. 104.
(20) *Official Assignee* v. *Tan Cheng Guan* (1904) 2 M.C. 1.
(21) *Richard* v. *Delbridge* (1874) 18 Eq. 1.
(22) *Warriner* v. *Roger* L.R. 16 Eq. 340.